STATE OF MICHIGAN

COURT OF APPEALS

INTERURBAN TRANSIT PARTNERSHIP, Respondent-Appellant,	UNPUBLISHED March 9, 2006
v	No. 256796 Michigan Employment Relations Commission
AMALGAMATED TRANSIT UNION, LOCAL 836, Charging Party-Appellee.	LC No. 01-000220

Before: Donofrio, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

In this employment case, respondent Interurban Transit Partnership appeals as of right the decision and order of the Michigan Employment Relations Commission (MERC), holding that respondent committed an unfair labor practice under Michigan's Public Employment Relations Act (PERA), MCL 423.201, et seq. We conclude that after respondent eliminated positions held by charging party members, PERA required that respondent bargain with charging party, Amalgamated Transit Union Local 836, before it entered into a contract with a private company to provide nearly equivalent services. We affirm.

I. Facts and Proceedings

In April 2000, voters of the city of Grand Rapids and five surrounding communities passed a transportation millage to form respondent. As successor of the Grand Rapids Area Transit Authority (GRATA), respondent assumed the collective bargaining agreement that GRATA had entered into with charging party, the exclusive bargaining representative of GRATA's bus drivers and bus maintenance personnel.

Before the millage was passed, GRATA offered two distinct services, a regular bus service with routes and schedules (referred to as "line-haul" service) and GO!Bus, a paratransit[1]

1 "Paratransit means comparable transportation service required by the [Americans with Disabilities Act] for individuals with disabilities who are unable to use fixed route transportation (continued…)

service that provides door-to-door transportation (referred to as "demand-response" service) for disabled passengers. Employees represented by charging party filled the regular bus service positions, but for several years, respondent filled GO!Bus service positions through an independent contractor.

As promised to voters for passing the millage, respondent implemented a third type of service, Passenger Adaptive Suburban Service (PASS), to provide all persons of the Grand Rapids metropolitan area access to the regular bus service. Like the regular bus service, the PASS vehicles arrived and departed from regular bus line hubs on a fixed schedule. However, the vehicles deviated from regular bus lines between hubs to pick up customers who had earlier scheduled to be picked up. The vehicle then transports the passenger toward the next regular bus line hub. Respondent filled the PASS (referred to as "deviated line-haul" service) positions with employees represented by charging party.

Sometime in 2001, respondent's management determined that, at certain times, there was insufficient demand for PASS service. Respondent decided to reduce PASS hours of operation, and eliminated weekend service and weekday service after 6:00 p.m. Respondent, however, began referring passengers who wanted to use the PASS service on evenings and weekends to GO!Bus. Respondent then paid a second subcontractor to provide "demand-response" service during evenings and weekends.[2] The second subcontractor used its own cabs and some PASS vehicles. Respondent, though, intended to supply the second subcontractor with respondent's vehicles for its customers.

Charging party sent a bargain demand letter to respondent stating that respondent had subcontracted the evening and weekend PASS positions held by charging party's members. Respondent denied that it was subcontracting jobs. Charging party filed formal charges against respondent alleging that the subcontracting of unit work was a mandatory subject of bargaining, and that respondent's refusal to bargain constituted an unfair labor practice under MCL 423.210(1)(e). The parties presented testimony before a hearing referee who drafted a recommended order finding that respondent had committed an unfair labor practice by failing to bargain over a mandatory subject of bargaining. The MERC fully adopted the referee's findings of fact, issuing a final order that required respondent to cease and desist subcontracting unit positions, to restore the status quo ante, and to make whole any of charging party's members who had lost work. Respondent appeals this decision and order.

II. Standard of Review

We review the MERC decisions "pursuant to Const 1963, art 6, § 28, and MCL 423.216(e)." *St Clair Co Intermediate School Dist*, 245 Mich App 498, 512; 630 NW2d 909 (2001) (internal citations omitted). The factual findings of the MERC are conclusive "if supported by competent, material, and substantial evidence on the record considered as a whole." MCL 423.216(e). "This evidentiary standard is equal to 'the amount of evidence that a

(…continued)

systems." 49 CFR 37-3.

[2] Respondent later changed all PASS service from deviated line haul service to demand-response service.

reasonable mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, it may be substantially less than a preponderance.'" *St Clair Co Intermediate School Dist, supra,* quoting *In re Payne,* 444 Mich 679, 692; 514 NW2d 121 (1994).

"The MERC's legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law." *Police Officers Ass'n of Michigan v Fraternal Order of Police, Montcalm County Lodge No 149,* 235 Mich App 580, 586; 599 NW2d 504 (1999), citing MCL 24.306(1)(a), (f) and *Port Huron Ed Ass'n v Port Huron Area School Dist,* 452 Mich 309, 323; 550 NW2d 228 (1996). Courts traditionally give considerable weight to an agency's longstanding interpretation of the statute. *Southfield Police Officers Ass'n v Southfield,* 433 Mich 168, 176; 445 NW2d 98 (1989); MCL 24.306(1)(a),(f); *Grandville Muni Executive Ass'n v City of Grandville,* 453 Mich 428, 437; 553 NW2d 917 (1996), citing *Gibraltar School Dist v Gibraltar MESPA-Transportation,* 443 Mich 326, 337; 505 NW2d 214 (1993).

III. Mandatory Subject of Bargaining

Respondent argues that PERA did not require it to bargain with charging party. We disagree.

PERA states that "[a] public employer shall bargain collectively with the representatives of its employees . . . and is authorized to make and enter into collective bargaining agreements with such representatives." MCL 423.215. PERA also provides that, "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." *Id.* Thus, "[m]andatory subjects of bargaining under [PERA] . . . include 'wages, hours and other terms and conditions of employment.'" *Manistee v Manistee Fire Fighters Ass'n,* 174 Mich App 118, 121; 435 NW2d 778 (1989) quoting MCL 423.215.

Although "[w]hat constitutes a mandatory subject is determined on a case-by-case basis," *Detroit Police Officers Ass'n v Detroit,* 61 Mich App 487, 490-491, 233 NW2d 49 (1975), "Michigan courts have held, in varying contexts, that the duty to bargain extends to the public employer's diversion of unit work to nonunit employees or to the subcontracting of the unit work to independent contractors." *Southfield Police Officers Ass'n v Southfield,* 433 Mich 168, 178; 445 NW2d 98 (1989). Indeed, this Court has stated that "[t]here is a duty to bargain over management's decision to subcontract bargaining unit work to nonunion members. This is a mandatory subject for bargaining under PERA." *Manistee, supra* at 123.

A. Diversion of Work to Non-unit Employees

Charging party asserted that respondent "violated Section 10(1)(e) of PERA by subcontracting bargaining unit work without first giving Charging Party notice and an opportunity to collectively bargain." Respondent claims its decision to eliminate night and weekend deviated line-haul positions was not a mandatory subject of bargaining because it eliminated deviated line-haul positions and added new demand-response positions, which is not the type of work performed by members of charging party.

We agree with the MERC that there has been no significant difference between the service available through the evening and weekend PASS service and the evening and weekend non-unit service. Suburban passengers that were able to access the regular bus-lines through the evening and weekend PASS service are now able access those lines from the non-unit service. Further, there is evidence that the non-unit service and the evening and weekend PASS service pick up the same passengers, service the same geographical area and use the same vehicles. In addition, respondent likewise schedules the non-unit service.

Contrary to respondent's claim, respondent's independent contract to provide GO!Bus service does not entitle it to eliminate positions held by charging party members and then replace those positions with demand-response service. The GO!Bus service is distinct from the demand-response service at issue. GO!Bus is a paratransit service, which does not service all passengers, but only disabled and perhaps elderly persons. We recognize that respondent altered the PASS service to become entirely a demand-response service. However, we agree with the MERC that the only significant change respondent made was to use non-unit employees of an independent contractor to provide the service that members represented by the charging party had previously provided. Therefore, we conclude that respondent has diverted unit work to nonunit employees, and therefore, respondent has a duty to bargain with charging party. *Southfield Police Officers Ass'n*, *supra*.

B. The MERC's Exclusivity Rule

Respondent argues that it need not bargain with charging party because charging party cannot establish that its members exclusively performed the transferred work. We disagree.

The "exclusivity rule" states that the transfer of union work to non-unit members is not a mandatory subject of bargaining unless unit members exclusively performed the work before it was diverted. *Southfield Police Officers Ass'n v City of Southfield*, 433 Mich 168, 176, 179; 445 NW2d 98 (1989). We have found no authority to extend the exclusivity rule beyond disputes over work claimed to be exclusive to one of at least two bargaining units. *Id*. at 176. Respondent claims *Detroit Dep't of Transportation v Amalgamated Transit Union, Local 26*, 11 MPER ¶ 29084 (1998), is controlling. We disagree. In *Detroit Dep't of Transportation*, non-unit labor performed certain work for several years when the respondent employer began to consider transferring that work to the charging party bargaining unit. However, the employer reconsidered and paid a different non-unit company to perform the work. *Id*. at slip op pp 2-3. The MERC panel agreed that since the work had not previously been performed exclusively by the bargaining unit, it was therefore not bargaining unit work, and the employer accordingly had no duty to bargain with the bargaining unit before subcontracting the work to another subcontractor. *Id*. at 6. Here, non-unit labor never performed evening and weekend service for all individuals before respondent decided to transfer the evening and weekend PASS service performed by charging party members to non-unit labor. Thus, *Detroit Dep't of Transportation*, *supra*, is not controlling.

In addition, the recognized rationale underlying MERC's exclusivity rule does not support its application beyond disputes involving at least two bargaining units. Indeed, in *Southfield Police Officers Ass'n*, *supra*, our Supreme Court supported the exclusivity rule, stating that otherwise the "public employer's transfer of nonexclusive work would always be subject to challenge by whichever unit loses the work." *Id*. at 185-186. In addition, our

Supreme Court indicated that "[t]he potential for perpetual conflict between competing bargaining units also raises the spectre of long delays and escalating public expense caused by impasse-resolution procedures that are peculiar to the PERA. Unlike the NLRA, a public employer under the state statute is not free to implement its final offer after bargaining parties reach an impasse." *Id* at 186. Further, the Supreme Court stated that, given the arbitration requirement in PERA, if the exclusivity rule were not recognized, the "public employer's hands would be tied with regard to simple work assignments. Since, [] several bargaining units and different unions are involved, multiple arbitrations could be generated over the same work assignment." *Id*.

Further, if non-bargaining labor has a dispute with the employer, the employer is free to find other non-bargaining labor. Unlike disputes between two bargaining units, the employer need not bargain with at least one of the bargaining units. Thus, while *Southfield Police Officer's Ass'n* does not expressly state that the exclusivity rule does not apply to disputes involving non-bargaining labor, the rationale the Court used in support of the rule does not apply with equal force to those disputes. Moreover, the members of charging party exclusively performed evening and weekend PASS service before it was diverted. Though respondent claims that the GO!Bus service is similar to the evening and weekend demand-response service, as earlier mentioned, the GO!Bus service is provided only for the disabled and elderly, which alone sets it apart from the evening and weekend demand-response service.

C. Futility of Bargaining

Respondent next argues that bargaining regarding the transfer of positions would have been futile because charging party could not have offered any concessions that would have altered respondent's decision. Respondent specifically contends that when a particular decision would not be amenable to the collective bargaining process because labor concessions could not alleviate the employer's economic concerns, the employer has no duty to bargain. *Bay City Education Ass'n v Bay City Public Schools*, 430 Mich 370, 382; 422 NW2d 504 (1988).

However, our Supreme Court has recognized that "subcontracting decisions are particularly amenable to the collective bargaining process." *Detroit Police Officers Ass'n, supra* at 95. More specific to this case, the MERC has long held that decisions to transfer unit work that are based at least in part on cost-saving are amenable to bargaining. *County of Ingham and Ingham Co Sheriff's Dep't v Capital City Lodge No 141, FOP*, 7 MPER ¶ 25020 (1994); see also *Highland Park v Police Officers Labor Council*, 17 MPER ¶ 86 (2004). The only rationale respondent offers for its decision to transfer evening and weekend deviated line-haul positions to non-unit employees was that there was insufficient demand for the service. This proffered rationale reveals that respondent's decision was grounded in the economic viability of continuing the program during off-peak hours. Based on this evidence, the MERC specifically determined that labor costs motivated respondent's decision to transfer the unit work. The MERC did not err in concluding that bargaining over an issue amenable to the collective bargaining process would not be futile. *Detroit Police Officers Ass'n, supra.*

D. Waiver of Right to Bargain

1. Management-Rights Clause

Respondent argues that charging party waived its right to bargain over the decision to subcontract evening and weekend deviated line-haul positions, by both agreeing to a management-rights clause in the collective bargaining agreement, and acquiescing to the past subcontracting of para-transit positions. We disagree.

"A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter." *Organization of School Administrators and Supervisors v Detroit Bd of Education*, 229 Mich App 54, 65; 580 NW2d 905 (1998) (emphasis in original) (citations omitted). The language of a management-rights clause must be "sufficiently specific to demonstrate that the union clearly and unmistakably waived its right to bargain," before a waiver will be found. *Amalgamated Transit Union, Local 1564 v Southeastern Michigan Transportation Authority*, 437 Mich 441, 463-464; 473 NW2d 249 (1991). The management-rights clause in the present case provided:

> The Management of the Authority's operations and the direction of the working forces shall be retained by the Authority, to be exercised in its sole discretion except for any rights specifically and explicitly restricted in this Agreement. The Authority has the right to determine the types and amount of service to be provided, including the making of schedules, frequency of service, and the amount of time allowed on individual runs; to modify, adopt, install, operate and maintain existing, new or improved equipment or methods of operation; to hire, promote, discharge for cause and maintain discipline and efficiency, subject to any limitations of this Agreement. The Authority also has the right to make and enforce reasonable and uniform work rules.

Here, the clause does not mention the diversion of unit work to non-unit employees. Thus, the MERC correctly determined that the language of this clause is not sufficient to show that the union "clearly and unmistakably waived its right to bargain" over the issue of subcontracting of unit work to non-unit employees. *Id*.

Respondent also argues that because the management-rights clause does not prevent the transfer of unit work, the dispute arose under the contract and should have been resolved through the mandatory grievance and arbitration procedure. We disagree.

In reviewing an agreement, the MERC's initial charge is to determine whether the agreement "covers" the disputed subject matter. *Port Huron Education Ass'n, MEA/NEA v Port Huron Area School Dist*, 452 Mich 309, 321; 550 NW2d 228 (1996). If the subject matter in dispute is "covered" by the agreement, and the contract has a grievance procedure with final and binding arbitration, the MERC will find that the contract controls and that no PERA issue is presented. *Id*. at 321-322.

However, as stated, the collective bargaining agreement did not specifically indicate that the union "clearly and unmistakably waived its right to bargain" in regard to the diversion of unit work. *Amalgamated Transit Union, supra*. This conclusion encompasses the finding that the management-rights clause did not "cover" the disputed subject. Having found that the subject of bargaining was not "covered" by the agreement, the MERC properly declined to defer to the contractual grievance and arbitration process.

2. Past Practice

Respondent contends that charging party acquiesced in the decision to subcontract demand-response service when failing to object to the diversion of paratransit positions. In *Lansing Fire Fighters Union, Local 421 v Lansing*, 133 Mich App 56, 66-67; 349 NW2d 253 (1984), the employer similarly claimed that "the unprotested transfer of [bargaining-unit positions] to nonunit civilian positions constitutes a waiver by past practice." This Court disagreed, observing that the evidence did not establish waiver but merely showed that unit work had been transferred without protest by union members. *Id*. at 67. Similarly, the record in this case only indicates that paratransit positions were diverted several years before this action was commenced. The MERC correctly found that the evidence did not support the assertion that charging party, through past acquiescence, had waived the right to bargain.

E. Legitimate Reorganization

Last, we address respondent's claim diversion of evening and weekend deviated line-haul positions did not require bargaining because it was part of a legitimate reorganization. Although we could decline to address the issue because it is not preserved for our review, *Goolsby v City of Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984), we will nonetheless address the claim.

Respondent cites *Bay City Education Ass'n, supra* at 381, and *Ishpeming Supervisory Employees, Local 128 v Ishpeming*, 155 Mich App 501, 510-511; 400 NW2d 661 (1987), in support of its claim that a transfer of jobs is within the unique prerogative of management and not subject to mandatory bargaining under PERA. However, in *Ishpeming Supervisory Employees*, this Court found that a specific, prior agreement between the parties "clearly allowed the city to reorganize its departments and to eliminate jobs." *Id*. at 510. Also, in *Bay City Education Ass'n*, the school district employer's right to transfer jobs arose by statute. *Bay City Education Ass'n, supra* at 381-382. Our Supreme Court observed "the district's transfer of special education center programs to the ISD was a fundamental management policy decision anticipated and authorized by the Legislature. *Id*. at 510.

As was the MERC, we are persuaded that the [school district's] decision is analogous to a partial closing of a business." *Id*.

Here, respondent's transfer of unit jobs to non-unit drivers was not specifically contemplated by statute or by previous agreement between the parties. Moreover, as the MERC determined, respondent's action with respect to the night and weekend PASS positions was not akin to the "partial closing of a business," but was a prototypical instance of subcontracting unit work. Neither *Bay City Education Ass'n, supra* nor *Ishpeming Supervisory Employees, supra* is applicable here.

IV. Conclusion

PERA required respondent to bargain with charging party because respondent eliminated positions held by charging party members and provided nearly equivalent services through non-unit labor. Respondent is not relieved of its duty to bargain by operation of the MERC exclusivity rule, the alleged futility of collective bargaining process or respondent's alleged

legitimate reorganization. Further, the collective bargaining agreement and charging party's past practices do not indicate that charging party in any way waived its right to bargain.

Affirmed.

/s/ Pat M. Donofrio
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly